Dr Jaswant Singh s/o Dato' Dall Singh v Majlis Perubatan Malaysia & Ors

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO R3–25–148 OF 2005
MOHAMAD ARIFF J
25 NOVEMBER 2009

Administrative Law — Judicial review — Application for — Procedure — Whether court mainly concerned with decision-making process or merits

Administrative Law — Judicial review — Application for — Whether proper to resort to judicial review despite existence of statutory appeal scheme — Application for orders of prohibition, certiorari and mandamus against Malaysian Medical Council and Preliminary Investigation Committee established under Medical Act 1971 — Subject matter involving disciplinary complaint under Medical Act 1971 — Whether leave to commence judicial review proceedings should have been granted — Whether rules of natural justice had been complied with — Whether there had been inordinate delay — Whether delay vitiating factor

This was an application for judicial review for orders of prohibition, certiorari and mandamus addressed variously against the Malaysian Medical Council and the Preliminary Investigation Committee ('PIC') established under the Medical Act 1971 ('the Act'). The subject matter of the action was a disciplinary complaint lodged against the applicant by the fourth respondent concerning negligence on the part of the applicant in conducting a medical examination of the complainant's Indonesian maid. The PIC had investigated the complaint and accorded the applicant the opportunity to appear before it, but the applicant declined to give evidence before the committee. The PIC had heard only the complainant, and on this basis framed the charge against the applicant and referred the case to the Medical Council. The applicant complained of 'wrongful conduct' of the PIC and 'non-disclosure of information' by the committee. The applicant alleged that the committee acted without jurisdiction when it framed the charge without hearing the evidence of all the relevant witnesses acquainted with the circumstances of the case. On 'non-disclosure of information' by the committee, the applicant took objection to the committee not disclosing particulars of the advice that it had received from the advocate and solicitor advising it. The applicant also raised that there was a delay of five and a half years from the date of lodgment of the complaint until the date of the framing of the charge against applicant, and during this period the PIC heard only one person. The respondents contended that the PIC had not acted frivolously or vexatiously. There was some substance in the

allegation made against the applicant for the committee to have framed the charge. The PIC had not breached any provisions of the Act or the Medical Regulations in relation to the procedure for the inquiry. Further, the legislation provided for an alternative remedy of statutory appeal.

Held, dismissing the application with costs:

(1) Although the subject matter was a disciplinary complaint under the Act, and the Act has its own statutory scheme for an appeal to be filed against any decision of the Medical Council as provided under s 31 of the Act, the applicant was nevertheless granted leave to commence judicial review proceedings since the application was in itself not frivolous or vexatious and disclosed a prima facie case and there was some substance in the grounds supporting the application. Further, the full argument on whether the statutory scheme excluded recourse to judicial review proceedings should best be heard during the substantive judicial review application proper (see paras 3–4); *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 referred.

(2) In certain defined circumstances it would be proper for the applicant to resort to the remedy of judicial review despite the existence of a statutory scheme (see para 5); *Wan Mohd Nazri Wan Hassan v Advocates & Solicitors Disciplinary Board* [2006] 1 CLJ 644 and *R v Gen Medical Council, ex parte Gee* [1987] 1 All ER 1204 referred.

(3) Proceedings relating to a professional disciplinary body where a practitioner is being enquired into and subject to disciplinary proceedings by his own peers is not a court proceeding. Some flexibility must therefore be accorded to the application of strict rules of procedure and evidence. Substance should, in this context, override form (see para 21).

(4) In exercising review jurisdiction, the court is mainly concerned with the decision-making process, not so much the merits, except in circumstances where the irrationality of the decision is being questioned and challenged (see para 21).

(5) The statutory scheme under Part IV of the Medical Regulations draws a distinction between two processes: (i) preliminary investigation and (ii) a disciplinary enquiry. The statutory scheme is both detailed and specific. The powers at the stage of preliminary enquiry are wide, and even wider at the stage of disciplinary enquiry at the level of the Medical Council. A strong case for judicial review jurisdiction will be required to be established to displace this detailed statutory scheme. The rules of natural justice have to be applied flexibly, provided of course the basic requirements of natural justice are fulfilled. The regulations did not conflict with these basic requirements. What is important is substance

over form. The applicant had been given the right to defend himself. He had chosen not to do so at the PIC on technical grounds (see para 21).

(6) There had been some inordinate delay, but to be fair both parties were to be blamed. Delay can in certain circumstances vitiate a decision, but per se it is not a vitiating factor. Much depends on evidence of prejudice caused (see para 21).

[Bahasa Malaysia summary

Ini adalah permohonan untuk semakan kehakiman untuk pelbagai perintah larangan, *certiorari* dan *mandamus* yang dikemukakan terhadap Majlis Perubatan Malaysia dan Jawatankuasa Siasatan Awal ('JSA') yang ditubuhkan di bawah Akta Perubatan 1971 ('Akta'). Perkara pokok tindakan adalah aduan tatatertib yang dikemukakan terhadap pemohon oleh responden keempat berkaitan kecuaian di pihak pemohon menjalankan pemeriksaan perubatan ke atas pembantu rumah Indonesia pengadu. JSA telah menyiasat pengadu itu dan memberikan pemohon peluang mengadap mahkamah, tetapi pemohon enggan memberikan keterangan di hadapan jawatankuasa. JSA hanya telah mendengar pengadu, dan berdasarkan ini telah membuat pertuduhan terhadap pemohon dan merujuk kes itu kepada Majlis Perubatan. Pemohon mengadu *wrongful conduct* JSA dan *non-disclosure of information* oleh jawatankuasa. Pemohon mengatakan bahawa jawatankuasa bertindak tanpa bidang kuasa apabila ia membuat pertuduhan tanpa mendengar keterangan semua saksi-saksi berkaitan yang mempunyai pengetahuan tentang keadaan kes tersebut. Berhubung *non-disclosure of information* oleh jawatankuasa, pemohon membantah jawatankuasa kerana tidak memberikan butiran nasihat yang telah diterimanya daripada peguambela dan peguamcara yang menasihatinya. Pemohon juga menimbulkan bahawa terdapat kelewatan lima setengah tahun dari tarikh aduan dibuat sehingga tarikh pertuduhan dibuat terhadap pemohon, dan sepanjang tempoh tersebut JSA hanya telah mendengar seorang sahaja. Responden-responden berhujah bahawa JSA tidak bertindak secara remeh atau menyusahkan. Terdapat sebab dalam pengataan yang dibuat terhadap pemohon untuk jawatankuasa membuat pertuduhan itu. kanm JSA tidak melanggar apa-apa peruntukan Akta atau Peraturan Perubatan berkaitan prosedur untuk siasatan. Bahkan, badan perundangan memperuntukkan remedi alternatif untuk rayuan statutori.

Diputuskan, menolak permohonan dengan kos:

(1) Walaupun perkara pokok adalah aduan tatatertib di bawah Akta tersebut, dan Akta tersebut mempunyai skima statutori tersendiri untuk rayuan difailkan terhadap apa-apa keputusan Majlis Perubatan sepertimana diperuntukkan di bawah s 31 Akta tersebut, pemohon bagaimanapun telah diberikan kebenaran memulakan prosiding semakan kehakiman oleh kerana permohonan itu dengan sendiri tidak remeh atau menyusahkan dan mengemukakan kes prima facie dan terdapat sebab

kukuh dalam alasan yang menyokong permohonan itu. Selanjutnya, hujah penuh berhubung sama ada skima statutori mengecualikan membuat tuntutan untuk prosiding semakan kehakiman patut didengar semasa permohonan semakan kehakiman substantif sewajarnya (lihat perenggan 3–4); *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 dirujuk.

(2) Dalam keadaan tertentu adalah wajar untuk pemohon menggunakan remedy semakan kehakiman meskipun terdapat skima statutori (lihat perenggan 5); *Wan Mohd Nazri Wan Hassan v Advocates & Solicitors Disciplinary Board* [2006] 1 CLJ 644 dan *R v Gen Medical Council, ex parte Gee* [1987] 1 All ER 1204 dirujuk.

(3) Prosiding berkaitan badan tatatertib profesional di mana seorang pengamal undang-undang disiasat dan tertakluk kepada prosiding tatatertib oleh rakan sekerjanya bukan satu prosiding mahkamah. Perlu ada fleksibiliti dalam permohonan berkaitan peraturan prosedur dan keterangan. Dalam konteks ini substans patut mengatasi bentuk (lihat perenggan 21).

(4) Dalam menggunakan bidang kuasa semakan, mahkamah paling prihatin dengan proses membuat keputusan, tidak sangat kepada merit, kecuali dalam keadaan di mana keputusan yang tidak rasional dipersoalkan dan dicabar (lihat perenggan 21).

(5) Skima statutori di bawah Bahagian IV Peraturan Perubatan menunjukkan perbezaan antara dua proses tersebut: (i) siasatan awal dan (ii) siasatan tatatertib. Skima statutori adalah terperinci dan spesifik. Kuasa di peringkat siasatan awal adalah luas, dan lebih luas di peringkat siasatan tatatertib di peringkat Majlis Perubatan. Kes kukuh untuk semakan kehakiman perlu dibuktikan untuk menggantikan skima statutori terperinci ini. Rukun keadilan asasi perlu digunakan secara fleksibel, dengan syarat keperluan asas keadilan asasi dipenuhi. Peraturan tidak bercanggah dengan keperluan asas tersebut. Apa yang penting adalah substans mengatasi bentuk. Pemohon telah diberikan hak untuk membela diri. Dia memilih untuk tidak berbuat demikian di JSA atas alasan teknikal (lihat perenggan 21).

(6) Perlu ada kelewatan melampau, tetapi untuk berlaku adil kedua-dua pihak patut dipersalahkan. Kelewatan boleh dalam keadaan tertentu melemahkan keputusan, tetapi ia bukanlah faktor yang melemahkan. Banyak bergantung kepada keterangan prejudis yang disebabkan (lihat perenggan 21).]

Notes

For cases on application for judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 254–279.

Cases referred to

B Surinder Singh Kanda v The Government of Federation of Malaya [1962] MLJ 169, PC (refd)

General Council of Medical Education and Registration of the United Kingdom v Spackman [1943] 2 All ER 337, HL (refd)

Ghanasekaran a/l Krishnasamy v Suruhanjaya Perkhidmatan Awam and Anor [2009] 3 MLJ 798; [2009] 3 CLJ 287, CA (refd)

Lembaga Jurutera Malaysia v Leong Pui Kun [2009] 2 MLJ 36; [2008] 6 CLJ 93, FC (refd)

Nwabueze v General Medical Council 56 BMLR 106, PC (refd)

QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164; [2006] 2 CLJ 532, CA (refd)

R v Gen Medical Council, ex parte Gee [1987] 1 All ER 1204, CA (refd)

Tan Boon Chee, David v Medical Council of Singapore [1980] 2 MLJ 116 (refd)

Wan Mohd Nazri Wan Hassan v Advocates & Solicitors Disciplinary Board [2006] 1 CLJ 644, HC (refd)

Legislation referred to

Evidence Act 1950 s 2

Medical Act 1971 s 31

Medical Registration Act [SG]

Medical Regulations 1974 reg 29(1), (3)

Registration of Engineers Act 1967 s 15(2)

PS Ranjan (Eunice HS Ong with him) (PS Ranjan & Co) for the applicant.

Gurdev Singh (Irmohizam, Gurdev & Co) for the first, second and third respondents.

S Kulasegaran (S Kula & Co) for the fourth respondent.

Mohamad Ariff J:

[1] This was an application for judicial review for orders of prohibition, certiorari and mandamus addressed variously against the Malaysian Medical Council and the Preliminary Investigation Committee ('PIC') established under the Medical Act 1971. The subject matter of the action was a disciplinary complaint lodged against the applicant, Dr Jaswant Singh by the fourth respondent. The PIC had investigated the complaint and accorded the applicant the opportunity to appear before it, but the applicant declined to give evidence before the committee. The PIC had heard only the complainant, and on this basis framed the charge against the applicant and referred the case to the Medical Council.

[2] The complaint itself concerned an alleged negligence on the part of the applicant in conducting a medical examination of the complainant's

Indonesian maid who had been referred to the applicant. The applicant had certified the maid as healthy and free of disease, but the complainant subsequently noticed that his maid was coughing and had blood in her sputum. Thereupon, the complainant took the maid to his family doctor who then referred her to undergo an x-ray at a specialist centre. The x-ray showed the maid had active tuberculosis. The complainant said in his complaint letter to the chairman of the Medical Council:

> On account of Dr Jaswant Singh's negligence my family and I were subjected to much inconvenience, stress, risk of disease, extra expenses incurred and am still without any maid. By paying the medical fees as demanded we expected the doctor as a professional to discharge his responsibility with great care, but instead of that he has put my family and I in mental torture and stress and also in financial loss …

[3] I was mindful in hearing the application that the subject matter was a disciplinary complaint under the Medical Act, and the Medical Act had its own statutory scheme for an appeal to be filed against any decision of the Medical Council as provided under s 31 of the Medical Act which provides:

> 31 Appeal against Orders of the Council
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> (1) Any person who is aggrieved by any order made in respect of him by the Council in the exercise of its disciplinary jurisdiction may appeal to the High Court, and the High Court may thereupon, affirm, reverse or vary the order appealed against or may give such direction in the matter as it thinks proper; the cost of the appeal shall be in the discretion of the High Court.
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> (2) The decision of the High Court upon such appeal shall be final.
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> (3) The practice in relation to any such appeal shall be subject to the rules of courts applicable in the High Court:
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> Provided that the High Court shall not have power to hear any appeal against an order made under section 30 unless notice of such appeal was given within one month of the service of the order in the prescribed manner.

[4] Nevertheless, I granted leave to the applicant to commence judicial review proceedings since I was satisfied that the application was in itself not frivolous or vexatious and disclosed a prima facie case and there was some substance in the grounds supporting the application. In any event, I was of the view the full argument on whether the statutory scheme excluded recourse to judicial review proceedings should best be heard during the substantive judicial review application proper. Going by the principle laid down by the Court of Appeal in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164; [2006] 2 CLJ 532, this is a matter which should not be decided at the leave stage but one which would be more properly decided at the hearing of the substantive application:

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> ... arguments such as the availability of an alternative remedy go to the merits of the substantive application for judicial review and ought never to be dealt with at the leave stage. The sole question at the leave stage is whether the application is frivolous. As Raja Azlan Shah LP observed in *Mohamed Noordin bin Johan v Attorney General Malaysia* [1983] 1 MLJ 68:

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> We allowed the appeal and granted the appellant leave to apply for an order of certiorari because we are of the view that the learned judge was wrong in refusing leave as the point taken was not frivolous to merit refusal in limine and justified argument on the substantive motion for certiorari.

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[5] I was of the view that in certain defined circumstances it would be proper for the applicant to resort to the remedy of judicial review despite the existence of a statutory scheme. Some support for this position could be obtained from the decision of the High Court in *Wan Mohd Nazri Wan Hassan v Advocates & Solicitors Disciplinary Board* [2006] 1 CLJ 644, although this was not a judicial review application but an application by originating summons.

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[6] In *Wan Mohd Nazri*, the disciplinary concerned was under the Legal Profession Act. The disciplinary board under the LPA had appointed a disciplinary committee without first appointing an investigating tribunal under the LPA. By failing to appoint the investigating tribunal, the High Court held the disciplinary board had breached the LPA and declared the proceedings of the disciplinary committee null and void.

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[7] I found further support for the proposition that the existence of a statutory remedy of appeal need not necessarily exclude a judicial review remedy in the English Court of Appeal decision of *R v Gen Medical Council, ex parte Gee* [1987] 1 All ER 1204, where the court held, inter alia, that the applicant was entitled to the particulars of the charge since 'he was entitled to know in advance the standard against which he was to be judged'. The decision impugned was that of the Professional Conduct Committee of the General Medical Council under the equivalent provisions of the UK Medical Act. Under UK legislation, an appeal lay to the Queen in Council, but the court nevertheless heard the application for judicial review. Mann J, at first instance, held:

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> I have no doubt that the matters complained of are susceptible to judicial review. The application is in the field of public law and that they relate to the exercise of statutory powers against an individual. Counsel for the GMC did not contend to the contrary. He accepted that the cases of which I am concerned are justiciable. My lack of doubt and counsel's acceptance accord with the decision of McNeill J … and with the decision of the Supreme Court of Victoria in *R v Pharmacy Board of Victoria, ex parte Broberg* [1983] 1 VR 211. I see no cause for reticence in

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approaching a threatened act in excess of a statutory jurisdiction or of a threatened abuse of the principle of fairness in the exercise of that jurisdiction (at p 1214 of the report).

[8] In this present judicial review, for instance, if the committee of investigation had acted without jurisdiction, such as failing to hear the evidence properly, it could be similarly in order for judicial review proceedings to be taken even before the full council proceeded to hear the disciplinary hearing. It would be a matter of absence of jurisdiction. The issue then became whether the PIC had acted ultra vires and therefore without jurisdiction under the statutory scheme of the Medical Act 1971.

[9] In essence, the applicant complained of 'wrongful conduct' of the PIC and 'non-disclosure of information' by the committee. In relation to 'wrongful conduct', the applicant alleged the committee did not take evidence from any other person other than the complainant although its duty was to call upon 'any person who from the complaint or information given otherwise appears to be acquainted with the circumstances'. Regulations 29(1) and (3) of the Medical Regulations 1974 was referred to. Further, it was argued if there was a procedure for the enquiry then that procedure should be applied; otherwise there would be a breach of the rules of natural justice. The committee, according to the applicant, had failed to order in writing the attendance of all relevant persons who were acquainted with the circumstances of the case.

[10] The arguments taken can best be summarised by quoting from counsel's submission advanced during the leave stage:

> The Committee acted without jurisdiction when it framed the charge without hearing the evidence of all the relevant witnesses acquainted with the circumstances of the case. Its duty was to determine, following a preliminary investigation, whether or not there shall be enquiry by the Council. That duty is not discharged merely by hearing only the evidence of the complainant when there were other relevant witnesses who were acquainted with the circumstances of the case that not given evidence. See the Medical Act 1971, section 36(2)(I) and Regulation 29(1) and (3).
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> Therefore, the Committee had acted without following the required procedure.
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> A failure by quasi judicial body holding an enquiry to take an essential step is a ground for intervention by the court. See *Wan Mohd Nazri Wan Hassan v Advocates & Solicitors Disciplinary Board* [2006] 1 CLJ 644.
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> If and when the case goes to the Council, by the regulations, the Council has no power to take evidence from those who have not been called to give evidence before the Committee. However, the practitioner may call witnesses to support his defence. See Regulation 31(3) and (5).

[11] On 'non-disclosure of information' by the committee, the applicant took objection to the committee not disclosing particulars of the advice that it had received from the advocate and solicitor advising it. It was argued that the applicant needed to have that information so as to enable him to prepare his defence. The cases of *B Surinder Singh Kanda v The Government of Federation of Malaysia* [1962] MLJ 169 and *Nwabueze v General Medical Council* 56 BMLR 106 were, inter alia, cited in support. The celebrated passage by Lord Denning in *Surinder Singh Kanda* was emphasised:

> If the right to be heard is to be a real right which is worth anything, it must carry with it the right in the accused man to know the case which is made against him. He must know what evidence has been given or what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v Rice* down to the decision of the Lordships' Board in *Ceylon University v Fernando*.
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> It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. … (at pp 172–173 of the report).

[12] *Nwabueze v General Medical Council*, supra, was a case more in point and concerned advice given in camera by a legal assessor to the Professional Conduct Committee of the General Medical Council. One of the issues before the Privy Council was whether the applicant was entitled to be informed of the legal assessor's advice to the PCC. On this the Privy Council held that parties should be informed of the legal assessor's advice to the PCC and be afforded an opportunity to comment on the advice. Lord Hope of Craighead held:

> ... Their Lordships consider that the principle which lies behind the requirement that the parties should be informed of the assessor's advice to the PCC is that of fairness, and that fairness requires that the parties should be afforded an opportunity to comment on the advice and that the PCC should have an opportunity to consider the comments before announcing the determination. … the reason why the legal assessor's advice to the committee must be given or made known to the parties afterwards in public is that the parties may have an opportunity of correcting it or of asking for it to be supplemented as the circumstances may require. In this respect the requirements of the common law would appear to be one with those of art 6 of the Convention, by which the PCC will be bound when the Human Rights Act 1998 comes into force (at p 118 of the report).

[13] In the course of the judicial review application, the applicant also raised an argument on delay. According to the applicant, there was a delay of five and half years from the date of lodgement of the complaint until the date of the framing of the charge against applicant, and during this period the PIC heard

only one person. This allegation was countered by both counsel for the first to third respondents, and the fourth respondent. The evidence disclosed that the delay was contributed as well by the applicant.

[14] The main argument nevertheless remained the first ground, namely the alleged 'wrongful conduct' of the PIC in failing to take evidence from all relevant witnesses. This ground was argued at length during the substantive hearing in the judicial review proceedings with counsel advancing the argument that at the stage of preliminary hearing, the committee must be satisfied there is a prima facie case, namely there was material supporting every essential ingredient of the charge. Thus, all those acquainted with the case should have been called before the committee. One of the things the committee had to consider, and did not, was whether the active PTB detected on 14 July had been present as well on 14 June. The applicant's counsel went at length to explain the circumstances surrounding the taking of three x-rays. One was allegedly taken in the applicant's clinic, and on this no one was called to give evidence. The second chest x-ray had allegedly not been a full examination, and the information had been sent for a further medical examination, and again no evidence was led on this. Counsel forcefully argued that the provisions in the Evidence Act should be taken as applying to the Medical Council and the PIC, since s 2 of the Evidence Act did not define 'judicial proceedings'. 'Court' is defined in the Evidence Act as including 'except an arbitrator, every person legally authorised to take evidence'. The Medical Council was a body established by the Medical Act and legally authorised to conduct investigations and had the power to record statements from witnesses. Therefore, so the argument ran, the rules of evidence must apply to it, and proceedings before the Committee and Medical Council must be governed by the Evidence Act. Even if the Medical Council was not subject to the Evidence Act, counsel argued fairness and justice would require the Medical Council and the PIC to comply with fundamental rules of evidence. Three case authorities were particularly relevant in advancing the submission. First, General Council of Medical Education and Registration of the *General Council of Medical Education and Registration of the United Kingdom v Spackman* [1943] 2 All ER 337 reports annotated, Vol 2, 33 (House of Lords) was cited for the following passage:

> It is not disputed that the General Medical Council, in exercising this jurisdiction, is not a judicial body in the ordinary sense: it is master of its own procedure and it is not bound by strict rules of evidence. It is not subject of correction by the courts as long as it complies with s 29 of the Act of 1858. That section draws a significant distinction between a case in which the impeached practitioner has been convicted of a felony or misdemeanour, and a case in which the allegation of infamous conduct is not connected with a criminal conviction. In the former case the decision of the council is properly based on the fact of the conviction, and the practitioner cannot go behind it and endeavour to show that he was innocent of the charge and should have been acquitted. In the latter case, the decision of the council, if adverse to the

> practitioner, must be arrived at 'after due enquiry', and this, of course, means after due enquiry by the council. … The question, therefore, is whether the council in this case can be regarded as having reached its adverse decision 'after due equiry' when it has refused to hear evidence tendered by the practitioner with a view to showing that he has not been guilty of the infamous conduct alleged and that the finding of the divorce court against him as co-respondent is wrong (at p 339 of a report).

[15] Mention has been made earlier of the decision of the English Court of Appeal in *ex parte Gee*, which is also relevant in this connection. Council cited the relevant passage by Lloyd LJ at p 1222 of the report, reading as follows:

> I cannot accept the argument of counsel for the GMC Mann J was, in my judgement, correct in saying that the purpose of proceedings before the Preliminary Proceedings Committee, as in proceedings before a examining magistrates, is to act as a filter. It is an essential safeguard to ensure that the doctor is not harassed by groundless complainants. That safeguard is equally important whether one is considering the original allegation or fresh allegation which might or might not give rise to a new charge … Counsel for the GMC further argued that it would be an intolerable burden if every piece of fresh evidence had to be considered by the Preliminary Proceedings Committee before being put before the Professional Conduct Committee. But that misses the point. Relevant fresh evidence would always be admissible in support of an existing charge …

[16] Lloyd LJ, it is to be noted, ultimately dissented on one issue, but the general principles stated above were equally applied by the other justices of appeal.

[17] The third case cited was a Singapore decision in *Tan Boon Chee, David v Medical Council of Singapore* [1980] 2 MLJ 116, which concerned a charge of infamous conduct under the Medical Registration Act of Singapore. This was a case where the Medical Council Singapore made an order to suspend the practitioner from medical practice, but the record of the enquiry showed that not all members of enquiry were present throughout the hearing. Members of the council were apparently walking in and out of the enquiry as and when they liked while the evidence of the witnesses was being recorded. This fact drew a strong retort from Choor Singh J who stated:

> The appellant was represented by counsel. Witnesses were called by both sides. The enquiry was held over two days. At the conclusion of the enquiry, the Medical Council made an order that the appellant be suspended from medical practice for nine months. The appellant now appeals at this court against the said order. A large number of grounds are relied upon for asking this court to set aside the order made by the Medical Council suspending the appellant from medical practice. I considered it unnecessary to consider them all to do with the merits of this case because on reading the record of this case I noticed something which has shocked

my sense of justice and is so glaring a breach of natural justice that the order made by the Medical Council cannot be allowed to stand. I express no opinion on the guilt or innocence of the appellant on the charges that were brought against him by the Medical Council. That is an entirely different matter which for reasons that follow it is unnecessary to decide … It is quite clear that some members of the Medical Council who took part in the council's determination did not hear the full evidence and all the submissions made. A person who has not seen and heard the witness is as a rule quite incapable of estimating the value of his evidence. It was therefore most improper for members of the council to walk in and out of the enquiry when the evidence was being recorded or to be absent altogether. Such conduct is not only improper and unfair to the practitioner whose conduct is the subject matter of the enquiry but it also tends to destroy confidence in the fairness of the council's decision. Justice must be rooted in confidence and confidence is destroyed when right minded people get the impression that the Medical Council did not give the practitioner a proper hearing … The statutory right to a hearing granted to a medical practitioner by s 23 of the Medical Registration Act is a right to a fair and proper hearing conducted in accordance with the principles of natural justice. The council has to decide whether infamous conduct has been made out to its satisfaction. It has not merely to ascertain the facts, but also to decide what standard to apply and whether to hold that the particular conduct is infamous, not in the abstract but 'in any professional respect'. Tremendous powers, which may close a man's professional career and ruin him financially and socially have been invested in the Medical Council byParliament from a faith both in the members' expertise in regard to the grave issue and in their moral integrity and trustworthiness. Such grave responsibility should not be exercised in a light-hearted or slipshod manner. (At pp 116–117 of the report.)

[18] By analogy from the fact situations in these cases it is argued that on the facts of this particular judicial review application, it was a breach of the rules of natural justice and elementary principles of fairness not to have allowed further witnesses to be called and interviewed before the PIC came to its decision to frame the charge.

[19] The respondents, on the other hand, stressed on the argument that the PIC was not a court of law, and on the facts the PIC had not acted frivolously or vexatiously. There was some substance in the allegation made against the applicant for the committee to have framed the charge. The PIC had not breached any provisions of the Medical Act or the Medical Regulations in relation to the procedure for the inquiry. Further, the legislation provided for an alternative remedy of statutory appeal. The application for judicial review was therefore premature and an abuse of the court's process. Counsel for the first to third respondents therefore argued the court should dismiss this judicial review application so that the Medical Council could then proceed to fulfil its statutory duty of hearing the disciplinary proceeding in the public interest. As for the ground related to the alleged failure to disclose the legal advice received by the committee to the applicant, reference was made to the Federal Court

decision in *Lembaga Jurutera Malaysia v Leong Pui Kun* [2009] 2 MLJ 36; [2008] 6 CLJ 93 and the principle laid down that there was per se no breach of natural justice for a tribunal to confer with its legal adviser without disclosing the substance of that advice to the person being disciplined. That this is the holding is apparent from the following passage in the judgment:

> With regard to the presence and participation of the legal adviser … the learned High Court judge erred in law and in fact in concluding that there was a breach of natural justice in relation to the legal advice rendered … to the appellant which was allegedly not disclosed to the respondent.
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> Clearly, in this case, there was no breach of natural justice for the appellant to confer with its legal adviser (Tan Hee Lock). However, there was one legal advice given to the appellant that related to the existence of a complaint which was raised by the respondent in its written submission. But this advice was disclosed in the appellant's letter …
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> Thus, on the facts, the respondent had not been prejudiced because the respondent was in fact given the opportunity to present further written submissions on the preliminary issue relating to complaint after the appellant had heard advice from its legal adviser on the matter. And the appellant considered the further submission of the respondent before making a decision. Apart from that advice, there was no other legal advice on new point had been considered need to be disclosed by the appellant to the respondent …
>
> The case of *B Surinder Singh Kanda* referred to by the respondent is not quite relevant to our case. In that case, the report that had not been disclosed that the appellant in that case contained evidence and findings of facts that constituted the heart of the charges against the appellant. Whereas in our case, the material that is the subject of the alleged nondisclosure is legal advice that related to the submission of law that had been raised by the respondent in written submission, and not evidence of findings of facts (see at pp 72–73 of the report).

[20] With reference to the argument on delay, the Court of Appeal decision in *Ghanasekaran a/l Krishnasamy v Suruhanjaya Perkhidmatan Awam and Anor* [2009] 3 MLJ 798; [2009] 3 CLJ 287 was cited for the proposition that delay per se could not be a ground to hold a disciplinary action void, since it did not amount to a condonation. Counsel for the fourth respondent (the complainant) in particular stressed that the alleged delay was contributed by the applicant himself.

[21] Having considered the very extensive submissions on the law by counsel and evaluated the principles against the facts of this judicial review application, I held that the applicant had not succeeded in establishing his case on the merits, and despite the laudable principles established in cases such as *ex parte Gee, General Council of Medical Education and Registration of the United Kingdom v Spackman and Nwabueze v General Medical Council*, I was bound by our own Federal Court decision in *Lembaga Jurutera Malaysia v Leong Pui Kun*

which has comprehensively stated the governing principles in relation to disciplinary tribunals. I was not convinced the slightly different statutory scheme which applied to engineers made a difference to these governing principles. I consequently dismissed the judicial review application with costs to be taxed, unless agreed.

[22] In dismissing the judicial review application I had provided the court's brief oral grounds, which I now reproduce below:

> This is an application for judicial review for which I had earlier granted leave since there was evidently prima facie an arguable case and the application was not in my view frivolous or vexatious. I was then, and still am, mindful that under the statutory framework an appeal procedure is provided under s 31 of the Medical Act, whereby the practitioner may appeal to the High Court. However, I was, and still am of the view, that in proper circumstances, the remedy of judicial review will still be available. In any event the applicable role on exhaustion of local remedies postulates that this is a matter which should not be decided at the leave stage but more properly to be decided at the hearing of the substantive application. See *QSR Brands Bhd v Suruhanjaya Sekuriti* [2006] 3 MLJ 164; [2006] 2 CLJ 532.
>
> I have given careful consideration in this case to the facts as well as the governing statutory framework in arriving at my decision, with particular attention being given to the Federal Court decision in *Lembaga Jurutera Malaysia v Leong Pui Kun* [2009] 2 MLJ 36. Lembaga Jurutera Malaysia is a binding authority on this court, needless to say.
>
> I am mindful as well of the overall general consideration that this court is adjudicating upon issues pertaining to a professional disciplinary body where a practitioner is being enquired into and subject to disciplinary proceedings by his own peers. The proceeding is not a court proceeding, nor for that matter a proceeding akin to it. Some flexibility must therefore be accorded to the application of strict rules of procedure and evidence. Substance should, in this context, override form.
>
> I need only emphasise that in exercising review jurisdiction, this court is mainly concerned with the decision-making process, not so much the merits, except in circumstances where the irrationality of the decision is being questioned and challenged.
>
> This present application is grounded on breaches of the rules of natural justice in the context of a disciplinary tribunal. The holding of the Federal Court in the *Lembaga Jurutera* case becomes immediately important as guiding principles. I refer to head note (5), (6) and (7) of the report, and the corresponding passages in the body of the judgement. I quote:
>
> ... A long line of established Supreme Court, Federal Court and Court of Appeal authorities... hold that every administrative body is the master of its own procedure and need not assume the trappings of a court. The rules of natural justice do not contain any inalienable fundamental right to cross examination of a witness, including the complainant... The rules of natural justice are variable and do not mean adversarial procedures of a court of law or analogous to a court of law.

In *Lim Ko*, Pike CJ (Borneo) said …:

> Clearly the form and the substance of the enquiry must be looked at closely to see whether in any substantial respect there could be said to be a denial of natural justice. But it must not be looked at as would the proceedings of a court and cases which relate to the standards expected of courts of justice are not in my opinion in point in consideration the nature of an enquiry into a disciplinary breach by a member of a professional body by fellow members.

... Ong HockThye FJ said:

> I will repeat what had been said earlier, that the proceedings of domestic tribunal in conducting an enquiry are by no means bound by the strict rules which apply to criminal trials.

Although the Federal Court was dealing immediately with s 15(2) of the Registration of Engineers Act, these principles are of general application and should also apply in the context of the Medical Act, unless the statutory scheme does not permit such reading. It is therefore also necessary to examine closely the statutory context of the Medical Act and the Medical Regulations to come to any conclusion that the principles in *Lembaga Jurutera* cannot be held applicable. The relevant provisions are those found under Part IV of the Medical Regulations headed 'Disciplinary Inquiries'. The statutory scheme draws a distinction between two processes: (1) preliminary investigation and (2) a disciplinary enquiry. Under reg 26 of the regulations the function of making a preliminary investigation into complaints or information touching on any disciplinary matter is vested in a committee known as the Preliminary Investigation Committee. Regulation 27 provides where complaint or information is made against a practitioner alleging a disciplinary offence, such complaint or information shall be forwarded by the President of the Medical Council to the chairman of the PIC. Regulation 28 further provides that the PIC may the summarily dismiss such complaint or information if satisfied —

(a) that the name and address of the complainant is unknown or untraceable;

(b) that even if the facts are true, the facts do not constitute a disciplinary matters; or

(c) for reasons which must be recorded, that there is a reason to doubt the truth of the complaint or information.

Regulation 28(2) further provides that before the committee can come to any summary decision, it may require the complainant to make a statutory declaration of the facts alleged that him.

As for the procedure for the preliminary enquiry, this is provided under reg 29 which states:

(1) Where the committee has reason to believe that the complaint or information is probably true, it shall —

(a) By order in writing require the attendance before the Committee, on the date and time and at a place to be specified therein, of the complainant

and any person who from the complaint or information given or otherwise appears to be acquainted with the circumstances;

(b) Inform the practitioner against whom the allegations are made, the substance of the complaint or information, the date, time and place at which the enquiry into the complaint or information shall be made and of his right to be present with or without counsel, to cross examine such persons who may be called at the enquiry.

…

(3) The committee shall examine the complainant and the persons in support of the application, who may in turn be cross-examined for the practitioner and if necessary re-examined and shall reduce to writing the statement made by the complainant and such persons examined.

(4) After taking the statements of the complainant and the persons in support of the allegation, the committee shall —

(a) If it finds that there are not sufficient grounds to support the allegation, recommend to the council that no action be taken; or

(b) If it finds that the statements support the allegation frame the charge and explain to the practitioner that he is at liberty to state his defence on the charge framed against him.

(5) If the practitioner after being informed of his right under sub reg (4) elects not to make a statement the committee shall recommend that they shall be an enquiry by the council.

(6) If the practitioner elects to make his defence before the committee, the committee shall record the statement as far as possible, word for word.

(7) After taking the practitioner's statement, the committee shall —

(a) If it finds that there are not sufficient grounds to support the charge, recommend to the council that no action be taken; or

(b) If it finds that there are grounds to support the charge, recommend the council that there shall be enquiry by the council.

Regulation 31 then provides for the powers of the Medical Council to hold a disciplinary enquiry against the practitioner. This is what it says:

(1) The council shall, where the committee recommends that there shall be enquiry, may, for reasons to be recorded, in cases where the committee, after hearing the statements of the complainants and other persons in support of the allegation has recommended that no action be taken, hold a disciplinary enquiry against the practitioner.

(2) The council shall cause to be served on the practitioner a notice specifying the date, time and place of enquiry and shall provide such practitioner with a copy of the charge or charges framed by the council after a consideration of the records submitted by the committee.

(3) The council shall not on the date of enquiry require any further statement to be recorded or made by the complainant or such persons who have made statements before the committee:

Provided that it may call for and shall record any statement from any such person if it is of the opinion that it would be fair and just to do so.

(4) The council shall, if after considering the statements made by the complainant and other persons in support of the allegation as found in the records of the preliminary enquiry by the committee, it is satisfied that there are grounds to support the charge call upon the practitioner to make any further statement as he deems necessary and to call such other persons as he may require to support his defence and shall record such further statement or fresh statement.

As can be easily appreciated, the statutory scheme is both detailed and specific. The powers at the stage of preliminary enquiry are wide, and even wider at the stage of disciplinary enquiry at the level of the Medical Council.

A strong case for judicial review jurisdiction will require to be established to displace this detailed statutory scheme.

Looking at this statutory scheme, I am not persuaded that the rules of natural justice must necessarily include the points raised by the applicant in this application. The rules of natural justice have to be applied flexibly, provided of course the basic requirements of natural justice are fulfilled. I do not find that the regulations, as presently worded conflict with these basic requirements. I must stress, what is important is substance over form.

The applicant has been given the right to defend himself. He has chosen not to do so at the PIC on technical grounds. The law on this is clear. If he elects not to make a statement to the PIC, the PIC must recommend that there should be an enquiry by the council. There will be a breach of the statutory requirement if it were not to so refer.

The practitioner should allow the statutory process to proceed as mandated by the statutory framework. Should the council decide against him, he will still have the avenue of appeal provided by statute to the High Court.

On delay, there has been some inordinate delay, but to be fair both parties are to be blamed. Delay can, of course, in certain circumstances vitiate a decision, but perse it is not a vitiating factor. Much depends on evidence of prejudice caused. It will be still open to the practitioner to submit on this point before the disciplinary enquiry in any event.

CONCLUSION

[23] For the reasons stated above, I was of the opinion the judicial review application for the orders of certiorari, mandamus and prohibition directed against the PIC and the Malaysian Medical Council should stand dismissed with costs. The disciplinary enquiry should best be allowed to proceed in accordance with the statutory scheme, and as seen above, the detailed regulations would provide sufficient safeguards to protect the practitioner at

the stage of disciplinary enquiry by the council. If he should still be aggrieved, if an adverse finding is made against him by the council, he will have the additional recourse in the form of the statutory appeal to the High Court under s 31 of the Medical Act 1971. The jurisdiction of the High Court in this instance will be wider since this will be based on a statutory appeal procedure, as opposed to the limited judicial review jurisdiction now being called in aid on his behalf.

Application dismissed with costs.

Reported by Kanesh Sundrum